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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

ROBERT SEALFON, *Petitioner*

v.

UNITED STATES OF AMERICA

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit

---

REPLY BRIEF FOR THE PETITIONER

JOHN J. WILSON
ROGER ROBB
Attorneys for Petitioner

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I

The indictment upon which the petitioner was first tried and acquitted charged a conspiracy among the petitioner, Fresh Grown Preserve Corporation, its officers, Leo and Murray Greenberg, S. J. Baron Corporation, Royal Crown Bottling Company of Baltimore, Inc., Royal Crown Bottling Company of Washington, Inc., and William C. Franklin, president of the Royal Crown companies. As an

overt act alleged to have been committed "in pursuance of, and in order to effect the objects of the said conspiracy", it was charged that "on or about the 3rd day of March, in the year 1943" the petitioner "did deliver to the Fresh Grown Preserve Corp., N. J., a letter signed Sero Syrup Company, Robert Sealfon, naming the agencies to which sugar and sugar syrups delivered to said Sero Syrup Company was destined". (App. A, *infra*, p. 14). Of the defendants named in this indictment, Fresh Grown and the Greenbergs pleaded guilty, and the S. J. Baron Corporation pleaded nolo contendere (R. 571). At the trial the court directed a verdict of acquittal as to the Royal Crown companies and their president (Tr. 377-424, 436-438, 563; Respondent's Brief pp. 5, 6). The case against the petitioner was therefore the only case submitted to the jury.

It is obvious that as a matter of law the jury was bound to return a verdict of guilty if the government on the trial of the conspiracy indictment established three facts: (1) that there was a corrupt agreement between the petitioner and the Greenbergs, (2) that the petitioner wrote the letter of March 3, 1943, and (3) that he wrote this letter pursuant to the corrupt agreement. In other words it was necessary for the government to prove only that the petitioner conspired with one of the codefendants, and that one overt act was committed pursuant to such conspiracy. The verdict of acquittal, therefore, meant that the government had failed to establish at least one of the three facts which would have compelled a finding of guilt by the jury.[1]

Each of the three facts, which were vital to the government's case at the first trial, was an essential link in the government's proof at the second trial. If one of these facts was negatived by the finding of not guilty then the

[1] The respondent concedes that the verdict of acquittal could not have been based on the failure of the jury to find that the letter of March 3, 1943, was written (Respondent's Brief, p. 33); hence the inescapable conclusion is that the jury found either that no conspiracy had been established, or that the letter of March 3 was not shown to have been written pursuant to a conspiracy.

second prosecution necessarily collapsed. The respondent in its brief (pp. 22, 23) attempts to escape the logic of this situation and to avoid the fatal consequences of the application of the principle of collateral estoppel, by the argument that

> the record of the first trial reveals that the verdict of acquittal does not, as petitioner contends, necessarily constitute a finding that petitioner had not entered into a corrupt agreement with the Greenbergs pursuant to which he wrote the letter of March 3d. The entire trial for conspiracy was predicated on the theory that petitioner was a party to a general over-all conspiracy involving, ultimately, petitioner, the Greenbergs, and the Baron Corporation, and the jury was never definitely or even impliedly told that petitioner could be convicted if he was not part of the over-all conspiracy but merely entered into a separate corrupt agreement with the Greenbergs. As the case was presented, summed up by counsel on both sides, and submitted to the jury by the judge, there was at least as great, if not a greater possibility, that the jury was impelled to return a verdict of acquittal on a finding that petitioner was not a party to the over-all fraud as on a finding that petitioner did not write the March 3d letter pursuant to a corrupt agreement with the Greenbergs. Hence the verdict of acquittal at the first trial can be taken as establishing only that the whole offense submitted to the jury was not proved, i.e., that petitioner was not a party to an over-all conspiracy involving petitioner, the Greenbergs and their corporation, and the Baron Corporation. It is not a finding as to any particular ground which may or may not have influenced the jury to reach that ultimate conclusion. *United States* v. *Adams*, 281 U. S. 202, 205. Hence, the verdict is not a finding that petitioner had not entered into a corrupt agreement with the Greenbergs.

Thus the respondent has rested its case upon the narrow proposition that the circumstances of the conspiracy trial make the doctrine of collateral estoppel inapplicable; that the verdict of acquittal meant *only* that the government had failed to establish that the petitioner had conspired

with *all* of the codefendants. Upon this position and theory the respondent must stand or fall. We think it clear that the respondent's argument is fallacious.

In the first place, the respondent's argument is based upon the premise that the conspiracy case was improperly argued by the district attorney and wrongly submitted to the jury by the trial judge. We submit that this proposition is untenable on its face. As we have said it must be conceded by the respondent that as a matter of law the jury was bound to convict if the government established the existence of a conspiracy or agreement between the petitioner and the Greenbergs, and established that the letter of March 3 was written pursuant to that agreement. The respondent's argument, that the case was submitted to the jury in violation of these correct principles of law, is based upon speculation and upon inference tortured from the arguments of counsel and the charge of the trial judge. We submit that no such strained interpretation of the arguments and the charge can demonstrate that counsel and the trial court and jury failed in their plain duty.

The record of the conspiracy trial affirmatively shows however that it was understood by counsel and by the court that a conviction must follow, if the jury found that there had been a conspiracy between the petitioner and the Greenbergs followed by an overt act in furtherance of that conspiracy; and the record also shows that this understanding was plainly conveyed to the jury. The argument of the prosecutor, from which we have quoted at length in Appendix B, *infra*, pp. 19-23 (Tr. pp. 546 *et seq.*) was based upon this theory; he attempted only to convince the jury that the petitioner had conspired with the Greenbergs, and had written the letter of March 3 pursuant to that conspiracy. He referred to the participation of the S. J. Baron Company only as evidence tending to show the nature of the alleged plan (App. B, p. 22, 23). Similarly with respect to the Baron Company, counsel for the petitioner argued only that as an evidentiary matter the peti-

tioner could not be charged with the acts of Baron, since there was no connection between the petitioner and Baron; that the petitioner dealt only with the Greenbergs, and that these dealings were not corrupt on the part of petitioner. Moreover the court on at least three occasions in his charge emphasized that it was necessary for the government to prove only that there had been a corrupt agreement or understanding between "two or more persons", followed by an overt act (App. C, pp. 27, 28, 29; Tr. pp. 562, 564, 565). Nowhere in the court's charge was there any suggestion that the jury was required to find an "over-all conspiracy", that is a conspiracy involving the petitioner and all of the codefendants. The court's theory of the case in this connection was clearly shown by his statement that he had "covered the second charge" requested by the petitioner (Tr. 576; App. C, p. 37). That charge was as follows (Tr. 584; App. B, p. 24):

> The defendant must be acquitted unless the Jury find beyond a reasonable doubt that he entered into a combination or agreement with Greenberg or Fresh Grown Preserve Corp., N. J. to defraud the Rutherford Ration Board and to induce the Board to issue sugar replacement certificates, on the presentation of false and fictitious documents.

Finally the court read to the jury the defendant's twelfth requested charge as follows (Tr. 578, 586; App. C, p. 39):

> If upon a consideration of all of the evidence you entertain a reasonable doubt as to whether this defendant conspired or confederated or agreed with the defendants Greenberg or Fresh Grown Preserve Corporation, New Jersey, or either of them, to commit the crime charged, then the defendant must be acquitted.

The fact that the court did not amplify and labor the point, that proof of an "over-all conspiracy" was unnecessary, does not justify the conclusion that the jury was incorrectly instructed. As this Court said in *United States* v. *Bayer*,

331 U. S. 5, "Once the Judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion".

II

As we have seen, the respondent's interpretation of the verdict of acquittal in the conspiracy case cannot be sustained. On the contrary that verdict necessarily meant either (1) that no conspiracy or agreement between the petitioner and the Greenbergs had been established, or (2) that the government had failed to prove that the petitioner had written the letter of March 3,[2] or (3) that the letter of March 3 was not shown to have been written pursuant to an agreement or understanding with the Greenbergs. Turning to the second trial of the petitioner we find that the theory of the government's case, upon which it then relied to convict the petitioner as an accessory, was that he had written the letter of March 3, pursuant to an agreement and understanding with the Greenbergs and for the express purpose of enabling them to use that letter, if needed, to show delivery of sugar to an exempt agency (see Respondent's brief p. 43). Failure to establish this theory in its entirety would necessarily have resulted in an acquittal. In other words it was necessary for the government at the trial of the substantive indictment to establish all of the three elements or facts which had been essential to the conviction of the petitioner at the first trial; the absence of any one of these three facts would have been fatal to the government's case at the second trial. And since the existence of at least one of these facts had necessarily been negatived by the verdict of acquittal, it plainly follows that the doctrine of collateral estoppel was applicable to preclude the second conviction.

United States v. *Adams*, 281 U. S. 202, which is relied upon by the respondent, plainly supports the petitioner's

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[2] See footnote 1, page 2 *supra*.

reasoning in the instant case. In that case the Court found an "alternative possible ground" for the former acquittal, and the Court pointed out that a finding of not guilty upon this ground was not fatal to the second prosecution. In the case at bar however a finding of not guilty upon any one of the three alternative possible grounds was necessarily fatal to the second prosecution. A situation similar to that in the *Adams* case existed in *Fall* v. *United States*, 60 App. D. C. 124; 49 F. (2d) 506, cert. den. 283 U. S. 867, where the court found an alternative possible ground for a prior acquittal, which was not inconsistent with a subsequent finding of guilt.

III

We submit that the theory of the respondent's brief, upon which the respondent has rested its case, is clearly fallacious. We think it follows that the respondent's argument must fail and that the decision of the court below must be reversed.

Respectfully submitted,

JOHN J. WILSON
ROGER ROBB
Attorneys for Petitioner

APPENDIX A

Conspiracy Indictment.

UNITED STATES OF AMERICA, District of New Jersey, ss:

In the District Court of the United States of America in and for the District of New Jersey, at the April Term thereof, in the year 1945.

The Grand Jurors of the United States of America duly impaneled, sworn and charged to inquire in and for the body of the said District of New Jersey, upon their oaths present,

(1) That on all of the days and dates hereinafter mentioned there was established, set up and organized and existing and acting at Rutherford, Bergen County, New Jersey, in accordance with law, a certain board or body, an agency of the United States, known and designated as War Price and Rationing Board No. 24.2.11, having territorial jurisdiction over certain cities, towns, townships and places in said County, including the Township of Lyndhurst, and having authority over a rationed commodity, to wit, sugar, and exercising authority to issue sugar purchase certificates upon special replacement applications for the replacement of sugar in the making, manufacturing and processing of products containing sugar for persons, firms and corporations and sold and delivered to or upon the orders of United States Maritime Commission, Panama Canal, Coast and Geodetic Survey, Coast Guard, Army, Navy, Civil Aeronautic Authority, National Advisory Commission of Aeronautics, Office of Scientific Research and Development, Army Exchange, Army Exchange Service, Post Exchanges of the Marine Corps, Ship Service Activities of the Navy and Coast Guard, Office of Distribution of War Food Administration, The Traveling Organization and Ship Service Stores of the War Shipping Administration, War Shipping Administration with respect to use as Ship Stores and Canteen Stores on Ocean going vessels,

the American Red Cross with respect to products for consumption by the Armed Forces and medical supplies for allied prisoners of war, the United Stervice Organizations, Inc., for consumption by the armed forces outside the United States and United Seamen's Service Inc., for consumption outside the United States and for export and foreign consumption upon proper export permits, (hereinafter called and referred to as the Exempt Agencies) over and above the fixed quota or sugar base assigned to such persons, firms and corporations;

(2) That on all of the days and dates hereinafter mentioned, Fresh Grown Preserve Corp., N. J., (hereinafter sometimes called and referred to as the Corporation) was a corporation of the State of New Jersey, located at and doing business at said Township of Lyndhurst, and engaged in the business of making, manufacturing and processing jellies, syrups and preserves and imitation jams, jellies, jellies, marmalades and preserves and selling and disposing of the same and having a fixed and established quota or sugar basis for the use and consumption of sugar in its products, and Murray Greenberg was President and Treasurer and Leo Greenberg was Vice President thereof and in full and complete control of all its business activities, transactions and affairs;

(3) That during the period between the 1st day of January, in the year 1943, and the 15th day of April, in the year 1944, and continuously from day to day during such period, at the Township of Lyndhurst, and at Rutherford both in the County of Bergen, State and District of New Jersey and within the jurisdiction of this Court,

FRESH GROWN PRESERVE CORP., N. J.,
a corporation of the State of New Jersey,
MURRAY GREENBERG,
LEO GREENGERG,
ROYAL CROWN BOTTLING CO. OF BALTIMORE, INC.,
a corporation of the State of Maryland,

ROYAL CROWN BOTTLING CO. OF WASHINGTON, INC.,
a corporation,
WILLIAM C. FRANKLIN,
S. J. BARON CORPORATION,
a corporation of the State of New York,
and
ROBERT SEALFON,

(hereinafter in this indictment sometimes called and referred to as the defendants), together with others to the Grand Jurors unknown, did, wilfully, knowingly, unlawfully and feloniously, conspire, combine, confederate and agree together to commit offenses against the United States, to wit;

(a) To knowingly, wilfully, unlawfully and feloniously utter and publish as true and cause to be uttered and published as true, to and upon the said Board, falsely made, false, forged and counterfeited writings purporting to be true and correct copies of invoices for goods sold and delivered to and for such Exempt Agencies or one or more of them, knowing the same to be false, forged and counterfeited,

(b) To knowingly, wilfully, fraudulently, unlawfully and feloniously and for the purpose of defrauding the United States, make and cause to be made to the said Board, an agency of the United States and in matters within its jurisdiction, to wit, the matters of the applications of the said Corporation for the issuance by the said Board of sugar purchase certificates in large amount and claimed by the said defendants to be for replacement of sugar, over and above and fixed quota or sugar base allowed the said Corporation, claimed to have been used and expended by the said Corporation in the making, manufacturing and processing of products sold and delivered by the said Corporation to and for such or various of the said Exempt Agencies, false and fraudulent statements and representations;

(c) To defraud the United States in its governmental function of conserving and rationing sugar fairly and equi-

tably among such Exempt Agencies, manufacturers and producers of products containing sugar and the public generally, by applying to the said Board for the issuance to the said Corporation of sugar purchase certificates in large amounts, in all to the amount of 25,000,000 pounds and upward, over and above its fixed quota or sugar base, and fraudulently and falsely pretending and representing that the said certificates asked for in its application was for sugar replacement actually used and expended by said Corporation in the making and processing of products actually sold and delivered for and to and for the use of Exempt Agencies, and to make and file with said Board, for the purpose of deceiving the said Board and to induce the said Board to issue such certificates to the said Corporation, false, fraudulent, fictitious, forged and counterfeited statements, papers and writings purporting to show, state and declare that the sugar purchase certificates applied for were for actual replacement and the products named in the same had been sold and delivered to, for and for the use of Exempt Agencies, when in fact the same had not been sold or delivered to, for or for the use of any Exempt Agency but converted and to be converted by the said defendants for their own use and benefit without regard to any Exempt Agencies, the said defendants knowing the said statements, papers and writings to be false, fraudulent, fictitious, forged and counterfeited and intending thereby to defraud the United States;

(4) And the said defendants planned, intended and designed, and it was part and parcel of the said conspiracy that the said Corporation would ship and deliver to others of the said conspirators, large amounts of sugar and sugar containing products for the exclusive use of the said other conspirators for a price and for sale or sale after further processing the same to whom they might respectively choose and for their respective use and benefit and not, except in small amounts and quantities, if any, and on rare occasions to any Exempt Agency, that the said

Corporation would use all the sugar purchase certificates is was able to obtain from the said Board and to which it was not justly entitled for and in the purchase of sugar from refineries and others and the amounts so obtained, in the form received from the refineries or as sugar products, would ship and deliver to others of the said defendants for sale and disposal to baking companies and other manufacturers of food products, beverages and other articles for disposal to the general public, that in order to deceive the United States and the Office of Price Administration, the officers, agents, investigators and employees thereof, from discovering the true and ultimate destination of the sugar so obtained upon the said sugar purchase certificates, the said defendants would keep and maintain false, fictitious and fraudulent records and books of accounts regarding their transactions in the shipment and delivery of sugar and sugar products between the said defendants, and the said defendants, Royal Crown Bottling Co. of Baltimore, Inc., Robert Sealfon, (using the name Sero Syrup Co., a name adopted and used by the said Robert Sealfon in his business) and S. J. Baron Corporation, would write, send, transmit and deliver to the said Corporation, letters and communications indicating that their principal business in the sale of sugar and sugar products was with the sale and delivery to Exempt Agencies, when in fact, very little, if any, of such business was with any such Exempt Agency;

(5) And it was further part and parcel of the said conspiracy, that in connection with applications of the said Corporation for sugar purchase certificates, it would be falsely and fraudulently shown, stated and declared to the said Board that the said Corporation had used and expended large quantities of sugar in the manufacturing and processing of certain products sold and delivered to various persons, firms and corporations for export to and consumption in foreign countries, when in fact, as the said defendants well knew, the said products had not been so sold and delivered to the persons; firms and corporations named and

had been otherwise sold and disposed of by the said defendants;

(6) The said defendants thereby designing to procure large amounts of sugar running into millions of pounds, to which they were in no way justly entitled, by false, fictitious, fraudulent statements and representations and by false, forged and counterfeited papers and writings, and thereby to cheat and defraud the United States as aforesaid.

OVERT ACTS.

And in pursuance of and in order to effect the objects of the said conspiracy, all at the County of Bergen, in the State and District of New Jersey and within the jurisdiction of this Court, certain of the said defendants, at the times and places hereinafter mentioned in connection with their respective names, did do and perform the following overt acts, to wit,

(1) On or about the 29th day of March in the year 1943, at Lyndhurst, the said

S. J. BARON CORPORATION

did deliver to the Fresh Grown Preserve Corp., N. J., a letter naming the agencies to which sugar shipped and delivered to them was destined;

(2) On or about the 15th day of April, in the year 1943, at Lyndhurst, the said

WILLIAM C. FRANKLIN

did deliver to the Fresh Grown Preserve Corp., N. J., a letter naming the agencies to which sugar delivered to Royal Crown Bottling Co. of Baltimore, Inc., was destined;

(3) On or about the 3rd day of March, in the year 1943, at Lyndhurst, the said

ROBERT SEALFON

did deliver to the Fresh Grown Preserve Corp., N. J., a letter signed Sero Syrup Company, Robert Sealfon, nam-

ing the agencies to which sugar and sugar syrups delivered to said Sero Syrup Company was destined;

(4) On or about the 9th day of February, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,

and the said

LEO GREENBERG

did exhibit to the said Board a false copy of a pretended invoice for marmalades, jams and jellies alleged to have been sold and delivered to Pavia and Company;

(5) On or about the 1st day of April, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,

and

LEO GREENBERG

did exhibit to the said Board a false copy of a pretended invoice for goods alleged to have been sold and delivered Joseph Sammos, under the name of Delft Packing Company;

(6) On or about the 1st day of February, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,

and

LEO GREENBERG

did show and exhibit to the said Board, a false copy of a pretended invoice for products alleged to have been sold to Pan Continental Export Company;

(7) On or about the 4th day of May, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
and
LEO GREENBERG

did exhibit to the said Board a false copy of a pretended invoice for marmalade alleged to have been sold to Meyer and Lange;

(8) On or about the 18th day of May, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
and
LEO GREENBERG

did show and exhibit to the said Board a false copy of a pretended invoice for marmalade alleged to have been sold to Puretest Products, Inc., at Rutherford;

(9) On or about the 2nd day of February, in the year 1943, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG
and
LEO GREENBERG

did make and cause to be made to the said Board a fraudulent application for the replacement of 54,120 pounds of sugar;

(10) On or about the 13th day of July, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG,
ROYAL CROWN BOTTLING CO. OF BALTIMORE, INC.,
and
ROBERT SEALFON

did make and cause to be made to the said Board a fraudulent application for the replacement of 488,773 pounds of sugar;

(11) On or about the 31st day of August, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG,
ROYAL CROWN BOTTLING CO. OF BALTIMORE, INC.,
WILLIAM C. FRANKLIN

and

ROBERT SEALFON

did make and cause to be made to the said Board, fraudulent application for the replacement of 545,184 pounds of sugar;

(12) On or about the 23rd day of September, in the year 1943, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG,
ROYAL CROWN BOTTLING CO. OF BALTIMORE, INC.,
WILLIAM C. FRANKLIN

and

ROBERT SEALFON

did make and cause to be made to the said Board a fraudulent application for the replacement of 545,184 pounds of sugar;

(13) On or about the 18th day of February, in the year 1944, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG,

and

ROBERT SEALFON

did make and cause to be made to the said Board, a fraudulent application for the replacement of 532,125 pounds of sugar;

(14) On or about the 22nd day of March, in the year 1944, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG,

and

ROBERT SEALFON

did make and cause to be made to the said Board a fraudulent application for the replacement of 589,985 pounds of sugar;

(15) On or about the 7th day of April, in the year 1944, at Rutherford, the said

FRESH GROWN PRESERVE CORP., N. J.,
MURRAY GREENBERG,
LEO GREENBERG,

and

ROBERT SEALFON

did make and cause to be made to the said Board, a fraudulent application for the replacement of 624,690 pounds of sugar;

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

EDGAR H. ROSSBACH
United States Attorney

APPENDIX B

Excerpts from final argument of District Attorney in conspiracy trial

546 Ladies and gentlemen, the Government set out to prove here that there was a conspiracy and that Sealfon participated in it, and in my offer now to demonstrate to you that that is true, I am not going to distinguish in my comments between the two; that is to say, I am not going to address myself to the first part of it and then to the second, but will deal with both joinly, because I think that that will make the picture clearer. And all that I am going to do is talk about the evidence and try to show you where it fits in. You have a right, first of all, to consider the position in which the Fresh Grown Preserve Company and Robert Sealfon, trading as Sero Syrup Company, found themselves leading up to March 3, 1943, the date on which the letter, the all-important letter was written, and you should consider that for 1942 the Fresh Grown Preserve Company had a basic quota of 2,100,028 pounds, and for 1943, up to April the 11th, when it was cut off by the OPA, the basic quota was 708,925 pounds. Their total basic quota was less than three million for those two years. You have a right to consider also that beginning on January 30th, 1943, the Fresh Grown Preserve Company, through the Greenbergs, originated the practice of filing false papers with the board. I am going to show you an important distinction that exists there, and I am talking about the testimony of Pure Test Products, Inc., Ameri-

547 can-African Export Company, Colonial Stores, Inc., and Pan-Continental Export Company.

I point out to you that with respect to those claims when they were filed with the Rutherford Rationing Board, the Greenbergs indicated in the applications and in the invoices attached that they were for export and there weren't any names of local exempt agencies in those applications or invoices, and that is important, because it wasn't until this

letter came through from Sealfon that the Fresh Grown Preserve Company enlarged their field, enlarged their scope and introduced names of local—and I mean in the United States—exempt agencies, and they are there and you can examine them. They saw that it worked when they did that. And then alongside of it, before we get to talking about the developments of the plan between the two, the negotiation of the plan, let us reflect on the position that Sealfon found himself in prior to March 3, 1943. He had an arrangement before February the 17th with the National Biscuit Company. Citron told you that his first deliveries there were on that date of February 17th and he knew then that whatever sugar he could get in the form of syrup he could sell to them in the form of vanilla syrup, not cherry or root beer or cream or something else which was the final product that went over to this Automatic Canteen Company. There wasn't any vanilla syrup in that; but he had this contract before and Kranski from the time it started, as he testified, was placed and stationed at the office of the Fresh Grown Preserve Company. Why was he there, I don't know the exact date that that started, but he was there as he said, because the National Biscuit Company complained that they weren't getting the right amount, the right quantity of syrup per unit, and Kranski had to stay there to watch that. Those two features of evidence here, ladies and gentlemen, show you the position that Sealfon was in, and show you that he wanted to get as the date of March the 3d, 1943 approached, vanilla syrup to fulfill that contract.

548

He wrote a letter dated March the 3d. Mr. Barshay, quite casually I thought, went over the testimony of Sanford Doctors that he gave here relating to the arrangements for this letter, and what he left out of his statement to you was the fact that Sanford Doctors, when he first talked to Greenberg, had a discussion with him about the scarcity of sugar, and of course everybody knew that, and you have a right to consider a thing like that which you

know from general knowledge and experience. They talked about the scarcity of sugar, and then Greenberg told Sanford Doctors to go to Sealfon and get from Sealfon a letter and to get a letter listing the names of exempt agencies, if there were any, and to get that letter and to tell Sealfon that if he wrote it he, Sealfon could get syrup from Greenberg in larger quantities. Doctors then proceeded to carry
out that mission and went there and obtained the
549 letter, and in it the first name that was mentioned was the Brooklyn Navy Yard, and he told you that the entire message that Greenberg gave to him was limited to Sealfon. He told Sealfon that Greenberg wanted the letter to get more syrup and with it to be able to sell more syrup to Sealfon. Why didn't Sealfon say "Automatic Canteen Company" in this letter if he were in such good faith instead of saying "Brooklyn Navy Yard"?

. . . . . .

The letter was turned in, sent by Sero Syrup to the Greenbergs. We don't have to prove that this letter was
exhibited to the local OPA board; that has been sug-
550 gested here too. That wasn't the plan at all, and Sealfon, you must infer from the facts, didn't care how the thing was accomplished so long as he got the syrup.

. . . . . .

551 Now, after the letter was written and delivered and the names were used, 596 invoices were submitted—and if you want to take the trouble to look at them you will see that all 596 called for deliveries of vanilla syrup, and you know that 98 per cent of that amount, which was 9,924,740 pounds, went to private customers of Sealfon—rather to the National Biscuit Company, and 2 per
cent, the 2 per cent remaining, to private customers
552 of Sealfon's. And, referring again for a moment to the letter, let me call to your attention that in his desire to make you think that Sealfon had in mind something besides his agreement with the National Biscuit

Company when he sent these through, counsel has said they had reference to our sales, and there weren't any such things as "our sales" of vanilla syrup.

Now, ladies and gentlemen, in presenting this case, the Government has introduced evidence concerning the participation of the S. J. Baron Company. The letter that the Baron Company wrote was on March the 29th, somewhat later than the Sealfon letter, and I wish to make it clear to you that in talking about the Baron Company's participation, or in presenting evidence here relating to it, we do not ask you to find Sealfon guilty because Baron was guilty. No such thing. We ask you to consider the evidence introduced about the Baron participation in order to show you that there was a conspiracy and what the plan was and how it operated; and if you look at the letter of March the 29th you will see that it is not very much different than the one of March the 3rd which Sealfon wrote. And if you look at the two of them you will see that there was considerable effort to couch in certain language what they wanted to say so as to protect themselves if they could. You heard about the negotiations for the Baron letter from Martin Lowenthal, who testified here that he operates the Lewis Martin Company Food Brokerage in New
553 York, and his testimony, just like the testimony of Sanford Doctors, is not contradicted in this case. He told you, just as Doctors did, that the Greenbergs talked to him about the proposed letter and sent him to Sol. J. Baron to get it and told him to tell Sol J. Baron to list the names of exempt agencies in this letter, and just as Doctors testified, Lowenthal also said that the instructions from Greenberg were to do this, obtain this letter, so that the Greenbergs could get more sugar and in turn sell more syrup to the Baron Corporation. And there again is the pattern and the plan of this conspiracy, and it makes no difference whatever, ladies and gentlemen, whether the Baron Corporation ever knew Sealfon or whether Sealfon ever had any transactions of any kind

with that company. Here are the names that are listed; they were read to you before and you will see them. March the 29th was the date of the letter. April the 1st, two days later, was the date of the first application containing one of those names and that April 1st application was accompanied by three invoices listing these names, one or more of them, and they were dated February 12, February 17 and February 20; and there again is the pattern, and from then on up until some time around July or August of the same year, the Baron Company obtained more and more sugar just as Sealfon did, as a result of this plan.

If you consider the similarity between those two
554 transactions you will see that the plan was there and carried out in the same identical manner.

. . . . . .

559 Analyze the evidence, all of it, and I am convinced that you must come to the conclusion that Sealfon knew what his purpose was when he wrote this letter. He certainly did it voluntarily. He entered into the conspiracy by this act and by his negotiations concerning it, and don't let him talk himself out of it now by any suggestion that he was referring to casual sales to some concession-
560 aire. A concessionaire, the name of a concessionaire, wouldn't help Greenberg if Sealfon put it in this letter to get sugar in larger quantities so as to sell syrup in larger quantities to Sealfon.

Ladies and gentlemen, I am convinced that if you analyze all of the evidence and look at this letter backwards and forwards and see what was behind it, you are going to have to come to the conclusion that Sealfon is guilty of this charge, and I ask you now in the name of the Government to find him guilty.

APPENDIX C

(1) Defendant's Requests to Charge in Conspiracy Trial

584 1. The fact that the defendant did not testify does not create any presumption against him. By his plea of "not guilty" he denies each and every allegation contained in the indictment.

2. The defendant must be acquitted unless the Jury find beyond a reasonable doubt that he entered into a combination or agreement with Greenberg or Fresh Grown Preserve Corp., N. J. to defraud the Rutherford Ration Board and to induce the Board to issue sugar replacement certificates, on the presentation of false and fictitious documents.

3. If the Jury should entertain a reasonable doubt that this defendant did not know that either Greenberg or Fresh Grown Preserve Corp. N. J. would or did present false and fictitious documents to the Rutherford Ration Board, for the purpose of obtaining sugar ration certificates, then they must acquit the defendant.

4. If the Jury should entertain a reasonable doubt that this defendant did knowingly aid, abet or counsel either Greenberg or Fresh Grown Preserve Corp. N. J., in the preparation or presentation of the false and fictitious documents, then they must acquit the defendant.

5. If the Jury entertain a reasonable doubt that the letter sent by this defendant on March 3, 1944, was intended to induce the Rutherford Ration Board to issue sugar
585 replacement certificates, then they must acquit the defendant.

6. In order to connect this defendant with the alleged crime, the Jury must be satisfied beyond a reasonable doubt that such connection is established by act, conduct or declaration of this defendant only, independent of any declaration or act of others.

7. The case against the defendant is based upon what is known in law as "circumstantial evidence." Such evidence is insufficient as a matter of law if it is equally consistent with either innocence or guilt, and unless the evidence points solely beyond a reasonable doubt to the guilt of the defendant and excludes innocence to a moral certainty, then the defendant must be acquitted.

8. The burden rests upon the prosecution to establish every essential element of the offense charged against this defendant, and every such essential element must be proven to a moral certainty and beyond a reasonable doubt. If any one of the essential elements of the offense is not proven to a moral certainty and beyond a reasonable doubt, or if there remains in the minds of the jurors a reasonable doubt as to whether or not the prosecution has established any such essential element of the offense, to a moral certainty and beyond a reasonable doubt, the Jury must acquit the defendant.

9. Mere suspicion or even mere probabilities are not sufficient to warrant a conviction. Suspicion is not a substitute for proof. If the substantial testimony in the
586 case merely establishes a train of suspicious circumstances or probabilities, the defendant must be acquitted.

10. The Court has no opinion and expresses no opinion as to the guilt or innocence of the defendant, and that if during the trial the Jury might have inferred, by reason of the Court's rulings or expressions, that he did possess such an opinion, they must exclude it from their consideration and dismiss it from their minds as being wholly unfounded.

11. If the Jury believes that the evidence is consistent with innocence as well as guilt, the defendant must be acquitted.

12. If upon a consideration of all of the evidence the Jury entertain a reasonable doubt as to whether this defendant conspired or invited or confederated or agreed with the defendants Greenberg or Fresh Grown Preserve Corp. N. J. or either of them, to commit the crime charged, then the defendant must be acquitted.

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561 **(2) Charge of the Court in Conspiracy Trial**

Newark, N. J., Thursday, December 19, 1945.

[Trial resumed pursuant to adjournment.]

[Appearances as before noted.]

The Court: Before I charge you, ladies and gentlemen of the jury, I desire to say that counsel for the defendant Sealfon made a motion to strike from the record certain testimony which was given by the witness Citron, and the testimony which he referred to I shall read to you. In response to a question, Mr. Citron said:

"Well, at that time, the way I was questioned, my impression was that if Mr. Leo Greenberg or Murray Greenberg knew of an existing purchase order they maybe wouldn't give me the syrup, I didn't know, and I was looking for the business more than anything else."

That is the thing you objected to..

Mr. Barshay: Yes, your Honor.

The Court: And I have granted counsel's motion to strike that from the record.

Now, striking testimony from the record means that the jury is not to consider it in any way. It is sometimes difficult to remember that such testimony has been stricken but I am telling you now that it has been stricken on motion of the defendant, and you are not to pay any attention to that particular tesimony given by Citron.

That, I think, takes care of that particular motion.

562 [The Court thereupon charged the jury as follows:]

THE COURT: Ladies and gentlemen of the jury, the Grand Jury of the United States in and for the District of New Jersey has returned an indictment against the Fresh Grown Preserve Corporation, New Jersey, Murray Greenberg, Leo Greenberg, Royal Crown Bottling Company of Baltimore, Inc., Royal Crown Bottling Company of Washington, Inc., William C. Franklin, S. J. Baron Corporation, and Robert Sealfon, charging them with conspiracy to defraud the United States and to commit offenses under Sections 72 and 80 of Title 18 of the United States Code Annotated.

The basic and fundamental charge in this indictment is conspiracy, and conspiracy has been denounced as an offense in the following language:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be punished as provided for in the same statute.

The two provisions of the Code which are referred to have to do with the making, forging, counterfeiting, or altering of bonds, bids, or public records, and transmitting such papers and presenting false claims and aiding in obtaining payment thereof.

563 At this time I shall say that because of actions heretofore taken, the Fresh Grown Preserve Corporation is not now on trial, nor is Murray Greenberg nor Leo Greenberg. At the end of the Government's case counsel for both Royal Crown Bottling Companies and William C. Franklin made a motion for a direction of verdict of acquittal and that motion was granted, and I direct you now to return a verdict of not guilty so far as the Royal Crown Bottling Company of Baltimore and the Royal Crown Bottling Company of Washington and William C. Franklin are concerned. The S. J. Baron Corporation is not presently on trial; so that the only remain-

ing defendant is Robert Sealfon. It was brought out during the course of the trial that the other defendants had pleaded. That, of course, must not weigh with you in any degree in determining the question of the guilt or innocence of Robert Sealfon; nor must the action taken by the Court so far as the other defendants who were on trial are concerned affect your deliberations.

Now, the mere fact that an indictment has been returned does not mean that you must consider the return of the indictment as evidence of any wrongdoing on the part of this defendant Sealfon. An indictment is not in any sense to be regarded by you as evidence. It is simply the formulation of a charge which is made against an individual in order that that individual may be apprised of the acusation made against him. It is not evidence and must
564 not be considered by you in any sense as evidence against this defendant. Sometimes people feel, "Well, an indictment wouldn't be returned unless there were some guilt; and where there is smoke there is fire." That is not true. So that so far as the indictment is concerned, when you take it with you to the jury room it will be simply for the purpose of informing you of the nature of the charge made against Sealfon, and the fact that it was returned must not in any way affect you adversely to the interest of this defendant Sealfon. I trust that is very clear to you.

The charge, as I have told you, is a charge of conspiracy, and it may be well now to consider what conspiracy is in order that you may know that with which this defendant is charged.

A conspiracy is a combination of two or more persons by concerted action to accomplish a criminal or unlawful object, or some purpose not in itself criminal, by criminal or unlawful means. Now, the gist of the offense is the combination or agreement to effect an unlawful end, and the offense is completed only on some one or more of the parties doing an act to effect the object of the conspiracy.

This is called an overt act; and in order to bring the conspiracy within the ambit of the statute, an overt act done by some member of the conspiracy must be found to have been done before the conspiracy would become illegal; because conspiracy itself, joining and combining, is not
565 enough; there must be some act done to further the object of that conspiracy before the statute would become effective.

The elements of a conspiracy are, first, an object to be accomplished, which must be either the commission of an offense against the United States or the commission of an offense to defraud the United States; secondly, a plan or scheme embodying the means to accomplish the object; thirdly, an agreement or understanding between two or more persons whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the scheme, or by any effectual means agreed upon; and, fourth, as I have said, an overt act by one or more of the conspirators, to effect the object of the conspiracy.

Now, there are certain considerations in respect to what a conspiracy means, and what is necessary for you to find before you could properly say that there was a conspiracy and that this defendant participated in it; and I shall stress those in different ways from time to time in order that you may get a complete and comprehensive idea of the nature of the charge which is made against this defendant. You, of course, must determine from the evidence whether or not a conspiracy existed, and then if you find that a conspiracy did exist, you must determine who were the members thereof. Of course, if you should find that there was no conspiracy, that would end the matter completely.
566 In the event that you determine that a conspiracy did exist and that the defendant conspired with others named in the indictment, whether they are actually on trial or not, then for such of them as you may find to have been engaged in the conspiracy, certain rules will

apply. I shall refer to those rules and when I refer to them you must keep in mind that they apply only if you find a conspiracy existed and that this defendant was a member of such conspiracy and that he conspired with others named in the indictment to attain the ends set forth in the indictment.

It is necessary, of course, to show that the defendant conspired and that all of the co-conspirators, the alleged co-conspirators, rather, had a purpose common to each of them, and that common purpose is an essential prerequisite. Of course, entry into the conspiracy may be made after its initiation, provided the person who entered it after it was formed had knowledge of its aim and had an intent to participate in the common agreement and to forward its design. Mere knowledge of the existence of a conspiracy, or even acquiescence in or approval of its ends and aims, without cooperation or agreement to cooperate, is not sufficient to make one a conspirator to commit the act. Whether the conspiracy was successful or not, of course, is not material, because its actual success or failure is of no moment provided the conspiracy was formed, joined in by the accused, and that an act was done in furtherance of the object of the conspiracy.

567 I have told you that it is necessary that a common purpose be shown, a purpose to effect something, some end or aim, which purpose is common to all. Now, how that may be shown is a matter to be determined from the evidence. It may, of course, be inferred where the parties concerned are pursuing the same object and adopt means leading to the same unlawful result. It is not necessary that all of the alleged conspirators know all and each of the other alleged co-conspirators, or be acquainted with them. It is not necessary that there be direct evidence of a formal agreement, but it is sufficient if the evidence of the separate details of the transaction as it was carried out indicate with requisite certainty the existence of a pre-concerted plan or purpose. If proven, however, by circum-

stantial evidence, the circumstances must be of such a character as to exclude every reasonable hypothesis except that of the defendant's guilt of the offense charged. And I might say now that in the course of summation, counsel may have made inexact or inaccurate statements, but the comments and remarks of counsel are not evidence. Counsel address you in an attempt to assist you to sift and weigh and appraise the evidence, but what they say themselves is not evidence and must not be considered by you as evidence, and if they make statements which differ from the testimony as you recall it, it is your recollection which must prevail and not any statement made by counsel.

568 It is a rule of law that the acts and admissions of co-conspirators which are done or made in furtherance of the object of the conspiracy are admissible against all of the conspirators, but before you may take the act or admission of any alleged conspirator and use it against any other alleged co-conspirator, you must find first of all that a conspiracy exists and that these parties were members of that conspiracy, that they had entered into a common agreement to effectuate the illegal object. But if you do find that, then the rule of law is that the acts and admissions of co-conspirators are chargeable to other members of the conspiracy.

All members of the conspiracy need not know all of the acts done by any other member in order to effectuate the end of the conspiracy. It is enough that they have the common purpose, that they entered into the common agreement to effectuate the illegal purpose, and that they were members of the conspiracy; because they are held to be responsibl for the acts of co-conspirators done in furtherance of the conspiracy, provided you find the conspiracy exists and that this defendant and the persons whose acts are in question are members of this conspiracy.

There must, of course, be intent on the part of the defendant as well as knowledge. There must be intent to defraud the United States or to commit a violation of the laws

of the United States; and as I have indicated to you,
569 mere knowledge that such is being done isn't sufficient; in addition to that, there must be actual participation.

Now, conspiracies and combinations are seldom able to be proven by the production of formal agreements. Ordinarily, conspirators don't sit down and write out the terms of what they are going to do, or the illegal activities they intend to engage in; they don't work that way, ordinarily. But you may consider all of the circumstances; and all of the facts and circumstances must be considered which are connected with this alleged conspiracy, and if they indicate the existence of the preconcerted plan and purpose, it will be sufficient to sustain a verdict, provided there is requisite certainty.

I shall repeat to you that the common design, which is the essence of the conspiracy, may be shown by proof of acts or circumstances from which a mutual understanding may be inferred, but you must be satisfied beyond a reasonable doubt that there was a meeting of the minds of all concerned in so far as the objects of the conspiracy are concerned.

I think, ladies and gentlemen of the jury, that I have included with fair comprehension that which you should know about the nature of the crime of conspiracy, but that, of course, does not exhaust the situation so far as this case is concerned. There are other rules of law which you must keep in mind and I shall give them to you as they occur to me.

One of the prime and principal and basic elements
570 of our jurisprudence is what is known as the presumption of innocence of the accused. Every person charged with crime is presumed to be innocent until proven guilty beyond a reasonable doubt, and that presumption of innocence is not just an idle phrase; it is an active protection which remains with the defendant throughout the course of the trial and a protection which may be taken

from him only should you be satisfied from the evidence beyond a reasonable doubt of his guilt. It is a mantle that enshrouds him always, at this very moment, right up to the time when your verdict is returned. And, as I say, it is not just a pretty phrase; it is a real, vital, fundamental right of this defendant, and you must always be conscious of that.

The burden of proving the guilt of the defendant beyond a reasonable doubt is upon the Government and that burden never shifts; not at any time is it requisite that the defendant affirmatively prove himself not guilty. And that that is a sage and wise provision which our founding fathers found to be all important may be easily realized when you think of how simple it is to charge a man with an offense and how difficult it is at times to meet that accusation; sometimes it is impossible. Therefore, realizing that a part of our jurisprudence insists that the Government, the charging party, bear the burden of proving the guilt of the accused beyond a reasonable doubt, and that burden never for a moment shifts.

I have used the term "reasonable doubt." Now,
571 that is a self-explanatory term, but for some reason or other it is not too easy of definition. It is the doubt of a human mind functioning normally and rationally, a doubt begotten from consideration of the evidence, with your minds working as they do in the ordinary, normal processes of life. A reasonable doubt may be said to exist if you cannot say, after consideration and comparison of all the evidence, that you have an abiding conviction to a moral certainty of the truth of the charge; and if you have any such reasonable doubt, that doubt must be resolved in conscience and in law in favor of the defendant. But the defendant is entitled to the benefit only of a reasonable doubt. He is not entitled to the benefit of any remote or hazy, fantastic doubt; he is not entitled to the benefit of a doubt which might be begotten of your unwillingness to convict a fellow human being, or of a doubt which might be based upon your fear that conceivably you might make a

mistake; because you are not to be fearful, you are to be courageous in meeting the obligation placed upon you. So that while the defendant is entitled to the benefit of a reasonable doubt, that's the only type of doubt to the benefit of which he is entitled.

The evidence which has been brought out here is to a very great extent circumstantial. Now, circumstantial evidence is good and valid evidence. Sometimes people say, "Well, you can't convict on circumstantial evi-
572 dence," That is not true. Circumstantial evidence must be considered by you, and it may, provided it meets with all of the requirements, properly be the basis of a conviction, should you be satisfied from it beyond a reasonable doubt that the defendant is guilty. But it must constitute an unbroken chain, leading ineluctably to the conclusion that the defendant is guilty. If from that circumstantial evidence you may draw a hypothesis which is consistent with innocence as well as consistent with guilt, you must give the defendant the benefit of the hypothesis consistent with innocence. But should the circumstantial evidence permit you to draw an inference only consistent with guilt, then it is satisfactory evidence, it is valid evidence, and you must accept it. Of course, mere suspicions or speculation in possibilities or probabilities are not a proper basis for a determination on your part. To suspect a man into jail would be a horrible miscarriage of justice. And so don't guess or speculate. Examine the evidence, weigh it, and arrive at your conclusion from a consideration of that evidence. Don't guess, speculate; get a factual basis for any determination that you may make. Now, I have told you that from facts as you find them after considering the evidence, you may draw reasonable inferences, but you may not on any inference that you draw, draw another inference. In other words, you can't make an inference the basis for the drawing of another inference. You may
573 draw an inference from facts but you may not infer anything from another inference.

There has been brought out before you testimony as to the good repute of this defendant, and I charge you that that is competent and valid evidence and may very properly be the basis of a reasonable doubt, and should it beget in your mind a reasonable doubt, you must resolve that doubt in favor of the defendant. But you may not take reputation evidence alone and use that as the basis for your findings. The reputation evidence must be weighed with all of the other evidence, and it would not seem logical that reputation evidence should offset completely conclusive evidence of guilt; but it is competent evidence and may be the basis of a reasonable doubt. It is only part of the evidence, however, and must be weighed with all of the other evidence which has been brought out before you.

You ladies and gentlemen are judges of the fact. You are to determine what credibility you will give to any witness who may have appeared before you, and you are to say what weight will be given to testimony as it has been adduced or to evidence as it has been introduced. The whole field of determining factual questions is solely, peculiarly, and exclusively yours. You may ask yourselves if any witness who took the stand had any interest in the outcome, and you may examine their deportment as they testified and ask yourselves whether the testimony as they gave
574 it is worthy of credence; and the whole matter of determining what you will believe, to what degree you will believe it, what importance you will give to testimony, is solely yours, and that is a province which may not be trespassed upon by anybody—not by counsel for the defense, counsel for the Government, or the Court; and if during the course of the trial either counsel or the Court has attempted to recall evidence and that recollection differs from yours, it is your recollection which must prevail because you are supreme in the domain of facts. You will determine the facts from consideration and comparison of the evidence and to those facts as you determine them you will apply the law as the Court gives it to you.

The defendant has seen fit not to take the stand. That is his right, and no inference unfavorable to him may be drawn from the fact that he did not take the stand.

You must, of course, not be swayed by prejudice or bias or by sympathy. You mustn't let anything you may have read about trials of this kind, or situations similar to that which you are weighing, determine you in any way. You are to prescind all you have heard before and determine this case on the evidence as it comes out before you here and on nothing else. It would be manifestly highly unfair to permit prejudice or bias to weigh against this defendant, and it would be equally unfair to permit sympathy to color your verdict. You are to do justice. That's what
575 you are here for. And you cannot do justice if you permit yourselves to be swayed by outside considerations, by emotions which do not belong in your deliberations. So cut away completely from any possible prejudice or bias, just as thoroughly as you cut away from all sympathy; because you are not here to give prejudiced or sympathetic verdicts—you are here to give true and just verdicts.

During the course of the trial the Court made certain rulings, made certain comments, and you are not from that to draw any inferences whatsoever. The Court was passing on questions of law. What I think about this case mustn't weigh with you in the slightest. You don't know what I think about it; and if you did, you must'nt be affected by it in any way; because you are to determine this case—it is not my business to indicate what I feel; and if you have thought that you know how I feel, it doesn't make a particle of difference. You are the jury, you are the judges of the fact, and I am the Judge to give you the law which will apply; and that's all I am here for—to conduct the trial, to see that the amenities are preserved, to see that the rules of evidence are sustained, and to tell you the law which you will apply to the facts as you determine them.

You must, of course, go into the jury room without your minds made up. You must discuss the situation with your fellow jurors. Don't go in with closed minds. You may have an impression, but it is your duty to discuss
576 the situation with your fellow jurors, give them the benefit of what you feel and what you think, and in return to receive from them—not "feel"; I am sorry; not what you feel but what you think from the evidence, and to receive in return the benefit of their consultation and advice, and after you have consulted and advised with your fellow jurors, then each of you must arrive at that conclusion which you feel to be in consonance with truth and justice and with your conscience.

I will say that your verdict may be either guilty, should you be satisfied beyond a reasonable doubt from the evidence adduced at this trial that the defendant is guilty, or not guilty, should you not be so satisfied. There is a third possibility; you may be unable to arrive at a common agreement, because any verdict at which you arrive must be unanimous, and in the event that you are not able to arrive at a verdict, you will so report to the Court.

I have been requested to charge certain rules of law by the defendant.

I have already charged you that the fact that the defendant did not testify does not create any presumption against him. By his plea of not guilty he denies each and every allegation contained in the indictment. I repeat that.

I think I have covered the second charge.

Mr. Barshay: Yes, your Honor, you have.

The Court: The third I refuse to charge in the
577 language requested and believe that I have charged the substance, the basis, of it.

I think I have charged the fourth sufficiently and refuse to charge in the language requested.

I refuse to charge the fifth in the language requested.

The sixth I feel that I have charged, but I will go over the matter again because I have told you certain things that I feel should be ever present in your mind.

"In order to connect this defendant with the alleged crime, the jury must be satisfied beyond a reasonable doubt that such connection is established by act, conduct or declaration of this defendant only, independent of any declaration or act of others."

Except in so far as circumstantial evidence of acts or declarations of his may have been testified to by others, and from which circumstances inferences may logically be drawn of participation.

I think I have charged the seventh sufficiently.

MR. BARSHAY: Yes, your Honor.

THE COURT: I shall say, however, in that regard what I have already said: that the evidence must be sufficient to exclude every reasonable hypothesis but that of guilt before you could convict.

I shall charge the eighth as requested:

"The burden rests upon the prosecution to estab-
578 lish every essential element of the offense charged against this defendant, and every such essential element must be proven to a moral certainty and beyond a reasonable doubt. If any one of the essential elements of the offense is not proven to a moral certainty and beyond a reasonable doubt, or if there remains in the minds of the jurors a reasonable doubt as to whether the prosecution has established any such essential element of the offense, to a moral certainty and beyond a reasonable doubt," then you must acquit.

The ninth I have charged, I believe,—

MR. BARSHAY: Yes, your Honor.

THE COURT: —in language which covers the sense of your request.

The tenth I refuse to charge in the language requested and feel that I have covered it sufficiently.

The eleventh I have charged and recharged—

MR. BARSHAY: Yes, your Honor.

THE COURT: —and, of course, the twelfth:

"If upon a consideration of all of the evidence you entertain a reasonable doubt as to whether this defendant conspired or confederated or agreed with the defendants Greenberg or Fresh Grown Preserve Corporation, New Jersey, or either of them, to commit the crime charged, then the defendant must be acquitted."

That I have already charged, but I will repeat it.

579 Now, ladies and gentlemen of the jury, there remains but little for me to say now, except that this case is a very important case. Every criminal case is a very important case so far as the defendant is concerned as well as so far as the Government is concerned; because the results affect both parties to the controversy. You are for this defendant now practically every activity of Government at this time. You represent for him all of the sound and wise protections given to every citizen, to every person in the position of this defendant, and you must be jealous to guard all of his rights. The Government of the United States does not ask you to make a sacrifice of an innocent person to prove its might or its potency. Every innocent person convicted, instead of attesting to the dignity and strength of Government, is a living witness of the weakness of that Government. Therefore, all that the Government of the United States asks in this instance is that you do justice. We don't have to prove the might and power and dignity and majesty of the United States of America. He who runs may read; and to all persons that majesty and dignity are evident. Remember that while unpunished crimes as well as undetected crimes are threats to the continuance of Government, injustice is a greater threat; but remember that the United States itself, while it prosecutes this defendant, insists that you guard his every right, because he is a part of the United States. On the

580 other hand, the United States Government is a party to this suit, and it has a right to demand of you that you be just as jealous of its rights as you are of the rights of the defendant. It insists that you must not sacri-

fice it because of misplaced sympathy. You know, the United States of America is not any remote entity, not any artificial, autocratic and tyrannical thing that oppresses all of us. The United States Government is made up of you and me and a hundred and thirty-seven or a hundred and forty million other people who are trying to live together in amity and peace and under law. That's all it is. And that Government, speaking for all of us, the defendant, the defendant's lawyers, the Government's lawyer, you, the jury, and me, the Judge, and all of our fellow citizens—that Government asks that justice be done between the two parties to this controversy; and unless we can hope for justice in our courts, we might just as well give up, because everything precious and dear to us will become as nothing, and all that has value will become valueless. Therefore do justice in this case. Be concerned about the defendant but only to the extent to which I have outlined his rights. It isn't the case of a great Juggernaut trying to crush a poor person. It is the Government of the United States trying to protect his rights and the rights of everybody else. He doesn't ask or hasn't the right to ask sympathy. He has the right to ask what the Government asks—justice. And he must get that at your
581 hands and the Government must get it at your hands.

These are stirring and troublous times and it is all the more essential now that truth prevail and that right predominate. Find out where truth lies and out of consideration of that truth, so far as you find it to exist in this case, arrive at your verdict; and if you do an unjust thing, you will have stricken a blow against the country we love, unless you do justice. That is a solemn thought. May it ever remain solemn with you.

And in conclusion, ladies and gentlemen of the jury, there is nothing that I can do to outline your duties better than to recall the words of the oath which you took: a true verdict to render according to the evidence, so help you God.

Ladies and gentlemen of the jury, you may take the case.

Swear the bailiffs. I shall discharge now with the thanks of the Court the two alternates.

[The bailiffs were duly sworn.]

THE COURT: Just a minute, please. Mr. Barshay.

[Mr. Barshay stepped to the bench.]

THE COURT: In the presence of the jury but out of their hearing, will you take your exceptions?

MR. BARSHAY: Yes. The defendant respectfully excepts to the Court's refusal to charge in the language as presented in the requests to charge No. 3, No. 4, No. 5. That's all.

THE COURT: All right.

MR. BARSHAY: Thank you.